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Nos. 1027 and 1028

In the Supreme Court of the United States

OCTOBER TERM, 1941

HARRY BRAVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

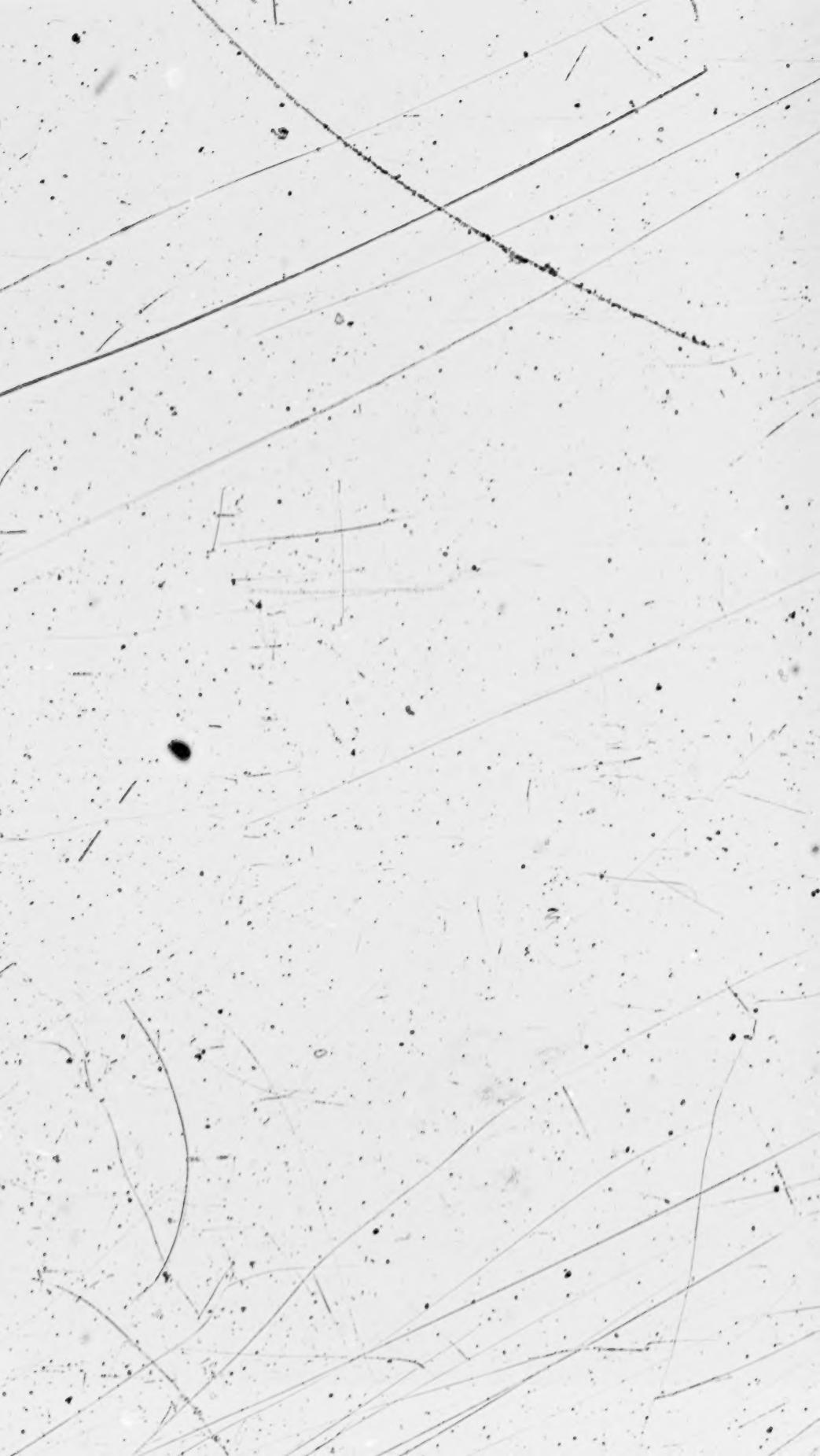
ALLEN WAINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES



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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 690-697) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 14, 1942 (R. 689), and peti-

tioners' separate petitions for rehearing (Wainer, R. 699-702; Braverman, R. 705-722) were denied on February 10 and March 2, 1942, respectively (R. 703, 723). The petitions for writs of certiorari were filed March 9, 1942. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Braverman Pet. 2; Wainer Pet. 8). See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court erred in imposing general sentences of eight years' imprisonment upon petitioners' convictions under a seven-count indictment charging conspiracies to violate various provisions of the Internal Revenue Laws, where the case was submitted to the jury in accordance with the Government's claim that the seven counts charged the illegal objects of one continuing conspiracy and that the proof showed that each petitioner entered into such a conspiracy.
2. Petitioner Wainer also raises the question whether the six-year period of limitation prescribed by Section 3748 (a) of the Internal Revenue Code for violations of Section 37 of the Criminal Code (the conspiracy statute) "where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment

thereof," is inapplicable to the conspiracy charged in the indictment.¹

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) reads:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more

¹ Petitioner Wainer raises a question of former jeopardy based upon the assertion that a former indictment in the Northern District of Illinois, to which he pleaded guilty, charged him with conspiring, among other places, at Chicago, Illinois, to violate the same laws, at Chicago and elsewhere, during the same time, as does the indictment in the instant case (Wainer Pet. 16). The Illinois indictment was marked as an exhibit (R. 475) in support of the plea of former jeopardy (R. 475-481), but is not printed in the record and apparently was not certified to the Circuit Court of Appeals as one of the original exhibits (R. 662, 664-666). The plea's rejection was not assigned as error (R. 49-51, 652-659), and the Circuit Court of Appeals did not pass upon the question (R. 689-697). Since the Illinois indictment is not in the record, comparison of it with the present indictment is, of course, impossible, and it cannot therefore be determined whether the plea was properly or improperly rejected. *Ex Parte Hull*, 312 U. S. 546, 551. It should be noted, also, that Wainer does not assert that the Chicago indictment charged that he entered into a conspiracy with the defendants named in the present case or that the conspiracy there charged was in fact the same as the one charged here (Wainer Pet. 16). Cf. *Short v. United States*, 91 F. (2d) 614, 624 (C. C. A. 4).

than \$10,000, or imprisoned not more than two years, or both.

Section 3748 (a) of the Internal Revenue Code (26 U. S. C. 3748 (a)) provides in part:

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. * * *

STATEMENT

On December 19, 1939, a conspiracy indictment in seven counts was returned against petitioners and 30 others in the District Court for the Eastern District of Michigan (R. 1-26). The allegations of each count are alike as to parties, time and places of entry into, and duration of, the conspiracies. Each count charges that the conspiracy therein alleged was to commit a particular offense against the internal revenue laws, viz: Count 1 (R. 1-7), unlawfully to carry on the business of wholesale and retail liquor dealers without having the special occupational tax stamp as required by law; Count 2 (R. 7-12), unlawfully to possess distilled spirits, the immediate containers thereof not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payments of all internal revenue taxes imposed on such spirits; Count 3

(R. 12-15), unlawfully to transport large quantities of distilled spirits, the immediate containers thereof not having affixed thereto the required stamps; Count 4 (R. 15-18), unlawfully to carry on the business of distillers without having given bond as required by law and with intent to defraud the Government of the tax on the spirits which would be distilled; Count 5 (R. 18-21), unlawfully to remove, deposit and conceal distilled spirits in respect whereof a tax was imposed by law, with intent to defraud the United States of such tax; Count 6 (R. 21-24), unlawfully to possess, keep in custody, control, and set up unregistered stills and distilling apparatus; and Count 7 (R. 24-26), unlawfully to make and ferment mash fit for the production of distilled spirits on premises not duly authorized and designated according to law as a distillery.

Petitioners and four others were tried upon the indictment.² At the close of the Government's case a motion was made on behalf of petitioners to require the Government to elect upon which count it intended to proceed, upon the ground that the proof showed only one conspiracy. (R. 462-

² Only three of the other defendants under this indictment were tried with petitioners; the others had either pleaded guilty or had not been apprehended (R. 620). Harry Klein, a defendant under another indictment which named petitioners as co-conspirators but not defendants, was also tried with petitioners (R. 620).

463, 467).³ Petitioners also moved for directed verdicts on the ground that the prosecution was barred by the running of the three-year statute of limitations, the indictment having been returned December 19, 1939, and the proof having showed that petitioners' connections with the conspiracy had terminated more than three years previous to that time (R. 464-467). These motions were denied (R. 481-482).

The Government took the position that the seven counts of the indictment charged the illegal objects of one continuing conspiracy and that the proof showed only one such conspiracy,⁴ but claimed that under the decision of the Circuit Court of Appeals for the Sixth Circuit in *Fleisher v. United States*, 91 F. (2d) 404, separate conspiracy charges would lie because each of the illegal objects constituted a separate and distinct offense (R. 460-467). The court refused to charge the jury on the theory of

³ At the beginning of the trial a motion to require the Government to elect upon which of the counts it would proceed was made and rejected (R. 59, 60).

⁴ The Assistant United States Attorney in charge of the prosecution stated that the manufacturing, transportation, failure to pay tax, etc. "are the separate illegal objects, alleged as to the objects of this conspiracy" (R. 468; see also R. 472), and that "The conspiracy is one as to time and place, and as to all the parties named in the indictment" (R. 470), but argued that the different objects of the conspiracy made it divisible into separate charges (R. 469, 474). He had also previously denied that the indictment set up seven separate conspiracies, stating, "It is one count—* * * One conspiracy indictment and seven counts charging seven illegal objects of the conspiracy" (R. 275).

seven separate conspiracies, as requested by the petitioner Braverman (R. 35-38, 40), and the case was submitted to the jury on the basis of the Government's claim that there was one continuing conspiracy (R. 626-629, 635, 639, 640-642). The jury returned a general verdict finding petitioners "guilty as charged" (R. 43), and each was sentenced generally to eight years imprisonment and the payment of a fine of \$2,000 (R. 44-45).⁵ The Circuit of Appeals for the Sixth Circuit affirmed these judgments (R. 689). As we read the opinion of that court (R. 690-697), it held, in effect, that, as a matter of law, a continuing conspiracy having as its objects the commission of seven different offenses may be punished as seven separate and distinct conspiracies because of the diversity of its objects (see particularly R. 690-692, 694, 695, 696-697).

⁵ The jury disagreed upon a verdict as to two of the defendants and found the other two, Morris Frank and Harry Klein, guilty (R. 43). The defendant Frank, who received the same sentence as petitioners (R. 46) and elected to enter upon service of his sentence pending appeal (R. 49), joined in the appeal (R. 647-651, 690, 697), but has not petitioned for certiorari. The defendant Klein abandoned his appeal (R. 695).

⁶ It would seem unnecessary to recite the evidence since the case turns wholly upon the correctness of the rule of law apparently applied by the District Court in imposing the eight-year sentences and relied upon by the Circuit Court of Appeals in sustaining these sentences. A brief summary of the evidence appears in the opinion of the Circuit Court of Appeals at R. 695-696.

ARGUMENT

1. We think petitioners are right in their contention that an eight-year sentence may not be imposed for a single continuing conspiracy even though the conspiracy may have as its objects the commission of seven different offenses (Braverman Pet. 2, 11-20; Wainer Pet. 5-6, 9, 10-14). We are impelled to this conclusion because we are of the view that the court below applied a test as to distinctiveness of offenses which, as is made manifest by decisions of this and other courts, may not be applied in conspiracy cases.

In reaching the conclusion that separate punishment could be imposed on each count (R. 694), the court below expressly applied (R. 691) the principle enunciated in *Blockburger v. United States*, 284 U. S. 299, 304, that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.⁷ But this Court was obviously dealing only with substantive offenses, differing *toto cœlo* in nature from conspiracy charges.

In a conspiracy case the gist of the crime is the conspiracy, the confederation or combination of minds. *Wong Tai v. United States*, 273 U. S. 77, 81; *Williamson v. United States*, 207 U. S. 425,

⁷ See also *Albrecht v. United States*, 273 U. S. 1, 11.

447; *Hyde v. Shine*, 199 U. S. 62, 76; *Bannon and Mulkey v. United States*, 156 U. S. 464, 468; *Dealy v. United States*, 152 U. S. 539, 547; *Pettibone v. United States*, 148 U. S. 197, 202; *United States v. Britton*, 108 U. S. 199, 204-205; *United States v. Hirsch*, 100 U. S. 33, 34. When the plot evolved contemplates bringing to pass a continuous result requiring continuous cooperation of the conspirators, the conspiracy is said to be continuing, but it is nevertheless single. *Kissell v. United States*, 218 U. S. 601, 607; *Brown v. Elliott*, 225 U. S. 392, 400. "The conspiracy is the crime and that is one, however diverse its objects" (*Frohwerk v. United States*, 249 U. S. 204, 210). Again, in *Ford v. United States*, 273 U. S. 593, 602, in speaking of an indictment which charged in one count a continuous conspiracy to violate two laws relating to the importation of intoxicating liquor into the United States, this Court said: "The charge is unitary in relating to one continuous conspiracy, although in proof of it different circumstances constituting it and overt acts in pursuance of it are disclosed." It follows, we submit, that one conspiracy in fact is but one conspiracy in law, regardless of the number of objective offenses it may contemplate.

These principles have been applied by the Circuit Courts of Appeals for the Second, Fourth, Fifth, and Seventh Circuits in holding that a single conspiracy does not become divisible because of the diversity of its aims and objects. *United*

States v. Manton, 107 F. (2d) 834, 838 (C. C. A. 2) (opinion by Circuit Justice Sutherland), certiorari denied, 309 U. S. 664; *Short v. United States*, 91 F. (2d) 614, 622 (C. C. A. 4); *Powe v. United States*, 11 F. (2d) 598, 599-600 (C. C. A. 5); *Bertsch v. Snook*, 36 F. (2d) 155, 156 (C. C. A. 5); *United States v. Anderson*, 101 F. (2d) 325, 333 (C. C. A. 7), certiorari denied, 307 U. S. 625; *Miller v. United States*, 4 F. (2d) 228, 230-231 (C. C. A. 7), certiorari denied, 268 U. S. 692; *Murphy v. United States*, 285 Fed. 801, 817 (C. C. A. 7), certiorari denied, 261 U. S. 617; see also *Tramp v. United States*, 86 F. (2d) 82, 83 (C. C. A. 8); *Troutman v. United States*, 100 F. (2d) 628, 632 (C. C. A. 10); *Ex parte Rose*, 33 F. Supp. 941, 942-943 (W. D. Mo.); *Sprague v. Aderholt*, 45 F. (2d) 790, 791-792 (N. D. Ga.); memorandum opinion in *Rogers v. Johnston* (N. D. Cal.), annexed to the Government's memorandum in *Schultz v. Hudspeth* (No. 802, present Term), now pending in this Court on motion for leave to proceed in *forma pauperis* and on petition for writ of certiorari.

It cannot be denied, however, that the decision of the court below finds support not only in earlier decisions of that Court, cited in its opinion (R. 690-692),* but in decisions of the Circuit Courts

* *Parmenter v. United States*, 2 F. (2d) 945, 946; *Fleisher v. United States*, 91 F. (2d) 404, certiorari denied on this point, 302 U. S. 673, but, in reality, distinguishable from the instant case for reasons hereinafter stated; *Meyers v. United States*, 94 F. (2d) 433.

of Appeals for the Eighth, Ninth and Tenth Circuits, which proceed, at least to some extent, on the same process of reasoning. *Beddow v. United States*, 70 F. (2d) 674, 676 (C. C. A. 8); *Thomas v. United States*, 156 Fed. 897, 912-913 (C. C. A. 8); *Yenkichō Ito v. United States*, 64 F. (2d) 73, 77 (C. C. A. 9); *Vlassis v. United States*, 3 F. (2d) 905, 906 (C. C. A. 9);¹⁰ *Schultz v. Hudspeth*, 123 F. (2d) 729, 731-732 (C. C. A. 10).¹¹ See also *Piquett v. United States* 81 F. (2d) 75, 78-80 (C. C. A. 7).¹²

This Court's disposition of the petition for a writ of certiorari to review the decision of the court below in *Fleisher v. United States*, 91 F. (2d) 404, lends no real strength to that court's decision in the instant case. In the *Fleisher* case the court below upheld consecutive sentences upon four counts of an indictment where each count

¹⁰ In this case, however, as is apparent from the court's opinion, the court's discussion of the question was *obiter dictum*, since concurrent sentences had been imposed under the two conspiracy counts of the indictment.

¹¹ The discussion in this case is, however, very meager.

¹² In this case, as indicated (*supra*, p. 10), a petition for writ of certiorari in *forma pauperis* has been filed by Schultz (No. 802), and the Government is filing a memorandum in reply in which it states that it cannot support the judgment of the Circuit Court of Appeals on the ground upon which that Court predicated its decision.

In *Telman v. United States*, 67 F. (2d) 716 (C. C. A. 10), cited by the court below (R. 691), the question was not raised or passed upon.

¹² In this case, however, it is evident from the court's opinion (p. 79) that the conspiracies were distinct in point of fact.

charged a conspiracy identical as to duration, conspirators and place of entry into the conspiracy, but to violate a distinct provision of the internal revenue laws. This Court denied certiorari as to the contention that the consecutive sentences constituted double punishment, in violation of the Fifth Amendment, but granted certiorari on another point (302 U. S. 673). However, as is apparent from the opinion of the court below in the *Fleisher* case (p. 406), that court did not have the aid of the evidence in determining whether only one conspiracy was involved since the evidence was not brought up on the appeal (p. 406). Additionally, it was impossible to determine from the face of the indictment whether there was but one conspiracy, and it was not at all beyond the realm of possibility that there could have been four separate conspiracies.¹² In the instant case, however, the several counts of the indictment were conceded by the Government to charge the illegal objects of one continuing conspiracy, it was likewise conceded that the proof disclosed but one such coconspiracy, the case was submitted to the jury on that theory, the jury necessarily found that the petitioners were each guilty of participation.

¹² Thus, in its brief in opposition (Nos. 202, 203, and 204, 1937 Term, p. 9), the Government pointed out that "It is not uncommon for large illicit liquor operators to have independent organizations for supplying the raw materials, manufacturing the liquor, and selling and distributing the finished product."

tion in the single conspiracy, and the consecutive sentences were approved by the Circuit Court of Appeals solely on the theory that such punishment would lie because of the distinctiveness of the offenses which were the objects of the conspiracy.

In view of the conflict of decisions the Government cannot, of course, oppose the granting of the petitions for writs of certiorari on the point under discussion, and it may be that the Court will desire to hear argument since the decision of the court below finds support not only in the prior decisions of that court but in several decisions by other Circuit Courts of Appeals. However, we think that these decisions are so manifestly out of line with the basic principles of the law of conspiracy, as enunciated in the decisions of this and other courts, that we have no objection to the reversal, without further argument, of the judgment of the Circuit Court of Appeals and the remanding of the case to the District Court for resentencing.¹⁴ A proper sentence would, of course, be a fine of not more than \$10,000, or imprisonment for not more than two years, or both, as authorized by the conspiracy statute (*supra*, pp. 3-4).

2. Petitioner Wainer contends (Pet. 14-16) that the general three-year period of limitation pre-

¹⁴ A new trial would not be required since, under the theory upon which the Government proceeded and under the trial court's charge, the jury necessarily found the petitioners guilty of participating in a single continuing conspiracy.

scribed by Section 3748 (a) of the Internal Revenue Code (26 U. S. C. 3748 (a)) is applicable and that since the proof showed that his last shipment of alcohol was made on or about July 24, 1936, more than three years prior to the return of the indictment (R. 1), the prosecution as to him was barred. However, Section 3748 (a) prescribes a six-year period of limitation for violations of the conspiracy statute "where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof" (*supra*, p. 4). The offenses charged in the various counts of the indictment as the objects of the conspiracy (*supra*, pp. 4-5) are clearly offenses under provisions which proscribe acts to evade or defeat the payment of a tax. The six-year period of limitation is therefore applicable.¹⁵

CONCLUSION

If certiorari is granted and argument is desired it should, we respectfully submit, be limited to the question whether the consecutive sentences were

¹⁵ This Court's decision in *United States v. Scharton*, 285 U. S. 518, cited by petitioner for the proposition that the excepting clauses contained in Section 3748 (a) are to be narrowly construed, furnishes no precedent for interpretation of the conspiracy clause contained therein. That case involved the interpretation of one of the provisos in the first paragraph of the section. The coconspiracy clause, on the other hand, is set forth in a separate paragraph in affirmative language, rather than as a proviso, and, as Wainer admits (Pet. 14), "was apparently added to conform to the decision in the *Scharton* case."

improper. As stated, however, the Government has no objection to reversal, without argument, of the judgment of the Circuit Court of Appeals and the remanding of the case to the District Court for appropriate resentencing.

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